DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
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FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTIO OF

AFLG-PRO (715) 13 Jul 99

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL 99-33), Various Protest Decisions

1. The enclosed protest decisions are of particular interests to the contracting community.

a. ACS Government Solutions Group, Inc., B-282098/.2/.3, June 2, 1999. Competitive offers for a task order under FSS contracts (encl 1).

DIGEST: Protest that agency improperly failed to evaluate offers consistent with instructions to offerors in solicitation for comprehensive loan servicing services is sustained where offerors were prohibited from proposing a solution that assumed that the agency would permit an electronic interface between the agency's and the successful offeror's data systems, and the record shows that the awardee's technical approach and price relied significantly on the existence of such an interface for performing the requirement.

Allegation that agency improperly evaluated the awardee's proposal under the prior experience evaluation factor was sustained where the solicitation contemplated the evaluation of corporate and key personnel experience separately, and the record contains no basis upon which the agency could reasonably have determined that the awardee's demonstrated corporate performance was, in accordance with the terms of the solicitation, the same as or similar to the solicitation requirements.

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Allegation that discussions with protester were not meaningful was sustained where the record showed that the evaluators were concerned over the protester's pricing methodology and the source selection official shared that concern, but the protester was not afforded an opportunity during discussions to explain its pricing strategy.

b. National Aerospace Inc., B- 281958; B-281959, May 10, 1999. **DIGEST:** Placement of an order at a significant price premium for the sole reason that the vendor quoting a lower price has no prior performance history in supplying the item being procured was unreasonable, where determination was not made in accordance with the stated evaluation scheme (encl 2).

c. Metro Machine Corp., (B-1872/.2/.3/.4). **DIGEST:** Where source selection authority considered protester's proposed approach to perform production shop work at a remote location to be unacceptable, and believed that the solicitation requirements established that only a proposal to perform production shop work on-site would be acceptable, agency misled protester during discussions by effectively communicating that modifications or enhancements to the protester's proposal to perform production shop work at the remote location would be sufficient to make proposal of that location acceptable (encl 3).

d. McDonnell Douglas Corporation v. NASA, DC Cir. No.98-5251, June 25, 1999. **DIGEST:** Reverse FOIA suit. DC Circuit reversed the District Court, which had granted summary judgment in favor of NASA's decision to release certain line item prices in McDonnell's contract. Although not deciding if the information were required (National Parks test) or voluntarily (Critical Mass test), the court stated that "if commercial or financial information is likely to cause substantial competitive harm to the person who supplied it, that is the end of the matter, for the disclosure would violate the Trade Secrets Act." Finding that McDonnell prevailed on the substantial competitive harm test, the Court reversed (encl 4).

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2. For additional information, contact Irene Hamm, DSN 367-5632, hammi@forscom.army.mil.

Encl

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for Contracting

Comptroller General
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Washington, D.C. 20548

Decision

Matter of: ACS Government Solutions Group, Inc.

File: B-282098; B-282098.2; B-282098.3

Date: June 2, 1999

Timothy B. Harris, Esq., for the protester.
Frances Cox Lively, Esq., Department of Housing and Urban Development, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly failed to evaluate offers consistent with instructions to offerors in solicitation for comprehensive loan servicing services is sustained where offerors were prohibited from proposing a solution that assumed that the agency would permit an electronic interface between the agency's and the successful offeror's data systems, and the record shows that the awardee's technical approach and price relied significantly on the existence of such an interface for performing the requirement.

2. Allegation that agency improperly evaluated the awardee's proposal under the prior experience evaluation factor is sustained where the solicitation contemplated the evaluation of corporate and key personnel experience separately, and the record contains no basis upon which the agency could reasonably have determined that the awardee's demonstrated corporate performance was, in accordance with the terms of the solicitation, the "same" as or "similar" to the solicitation requirements.

3. Allegation that discussions with protester were not meaningful is sustained where the record shows that the evaluators were concerned over the protester's pricing methodology and the source selection official shared that concern, but the protester was not afforded an opportunity during discussions to explain its pricing strategy.

DECISION

ACS Government Solutions Group, Inc. (ACS) protests the issuance of a task order to Deloitte & Touche (D&T) under request for proposals (RFP) No. R-DEN-00614, issued

by the Department of Housing and Urban Development (HUD) for comprehensive loan servicing services. ACS argues that HUD failed to adhere to the instructions to offerors; improperly evaluated the awardee's proposal; failed to conduct meaningful discussions with ACS and held improper discussions with the awardee; and based its selection on a flawed price/technical tradeoff analysis.

We sustain the protest.

Background

The RFP, issued on November 19, 1998, contemplated the issuance of a task order for a base period with up to three 1-year option years. RFP § B, ¶ 1.3, at B-1, B-2 and § E ¶ 1.3(f)(1). The contractor is to perform a full range of comprehensive servicing of HUD's Secretary-held single family mortgage portfolio. Id. § C-1, ¶ 1.1. The required services include initial loan set-up, servicing the loan, and accounting-related functions. Id. The RFP specifically limited proposals to those firms included on a General Services Administration Federal Supply Schedule (FSS), for Loan and Other Asset Servicing/Management services. Id. § E, ¶ 1.2.

The RFP provided for a two-phase procurement cycle. In the first phase, offerors were required to submit a statement of qualifications and past performance, which was to be reviewed by an evaluation panel to determine which firms would be invited to participate in the second phase of the procurement. Id. § E, ¶ 1.2(b). In the second phase, offerors were required to submit a written business proposal and provide an oral presentation for their technical and management proposals. Id. Upon completion of the oral presentations, a technical evaluation panel (TEP) was to conduct discussions and obtain clarifications from the offerors. The RFP stated that upon conclusion of all oral presentations, the TEP would perform a final technical evaluation of the presentations and offerors would be afforded an opportunity to submit written final proposal revisions (FPR) based upon the discussions. Id.

The RFP listed the following technical evaluation factors in descending order of importance (respective weights, which were not disclosed in the RFP, are shown in parentheses): quality control (50 points), plan of accomplishment (40 points), management capability (35 points), and prior experience (25 points), for a maximum possible score of 150 points. Id. § E, ¶ 1.7(a)(2); Contracting Officer's (CO) Statement, Mar. 30, 1999 at 3. Price was not to be numerically scored.[1] RFP § E, ¶ 1.8(a). The RFP stated that combined relative merit under the technical evaluation factors was to be considered more significant than price. Id. ¶ 1.8(a). HUD would

[1]In addition to requiring a total price for start-up costs, for each of the base and option years, offerors were required to submit unit prices per month for servicing estimated quantities of loans and partial claims. RFP amend. 3, § B.

issue a task order to the responsible offeror whose offer conformed to the solicitation and was deemed more advantageous to the government. Id.

Of the four firms invited to participate in the second phase of the procurement, three firms, including ACS and D&T, responded by the November 30, 1998 closing date. CO Statement at 3. Oral presentations were limited to 1 hour for each firm; discussions were held immediately following each oral presentation; and the TEP then convened to arrive at initial consensus ratings. The agency then requested FPRs, and the TEP reevaluated proposals based on the FPRs, with the following final consensus results for the protester and the awardee:

Firm	Score	Risk	Total Price
D&T	146	Low	$36,634,084.20
ACS	141	Low	20,183,094.32

Agency Report (AR), exh. 50, Memorandum from the CO to the Source Selection Official (SSO) at 2nd and 3rd unnumbered pages (Dec. 31, 1998).

Based on the results of the evaluation, the TEP recommended to the CO that D&T be issued the order as the firm offering the best overall value to the government. AR, exh. 51, Memorandum from TEP to CO at 5 (Jan. 4, 1999).[2] That recommendation was then forwarded to the SSO for a final decision. The SSO accepted the TEP's recommendation, concluding that D&T offered a higher level of experience, technical ability and additional benefits to HUD, especially in the areas of tax and due diligence services, which justified paying a premium for D&T's proposal. AR, exh. 56, Memorandum from the SSO to the CO at 3rd unnumbered page (Jan. 19, 1999). By letter dated February 10, HUD informed ACS that the task order had been issued to D&T. This protest to our Office followed a written debriefing.[3]

Protester's Contentions

ACS primarily argues that in issuing the order to D&T, HUD improperly disregarded the solicitation's instructions that offerors were required to use HUD's loan servicing software system, referred to in the record as "Strategy," and because, in further

[2]During the course of these proceedings, the agency discovered that there are two slightly different versions of this document in the record, both dated January 4 and signed by the TEP Chairperson. Our comparison of these two documents, however, reveals no material differences that affect the TEP's recommendation or our analysis of the issues presented in this protest.

[3]Pursuant to Federal Acquisition Regulation (FAR) § 33.104(c)(2)(i) and (ii), the head of the contracting activity authorized D&T to continue performance of the contract notwithstanding the protest.

disregard of HUD's instructions to offerors, D&T's approach assumed that HUD would permit an electronic interface between Strategy and D&T's data systems.

ACS also argues that HUD improperly evaluated D&T's proposal under the prior experience factor. In this connection, ACS maintains that the evaluators improperly awarded D&T's proposal a nearly perfect score in this area despite the fact that neither D&T nor its teaming partner demonstrated corporate experience in performing loan servicing that was the "same" as or "similar" to the solicitation requirements.

The protester also argues that HUD conducted improper discussions with D&T and failed to conduct meaningful discussions with ACS, and that the agency's price/technical tradeoff decision was flawed.

Discussion

Instructions to Offerors

ACS's primary ground of protest is that HUD provided specific instructions to offerors which were designed to permit the agency to evaluate proposals on an equal basis, and that in accepting D&T's proposal, HUD improperly disregarded those instructions. Specifically, ACS contends that the solicitation required offerors to use HUD's software system, Strategy, which HUD was developing specifically for this loan portfolio. In addition, ACS argues that HUD instructed offerors not to propose the use of an electronic interface between their system and Strategy, and to reserve proposing additional services and capabilities until after award. According to ACS, D&T disregarded the agency's specific instructions that offerors were to use HUD's Strategy system and proposed an electronic interface between its data systems and HUD.

HUD takes the position that this is a "performance-based" solicitation, where the RFP explained HUD's objectives and left it up to the offerors to determine how to accomplish the tasks. Memorandum of Law, Mar. 30, 1999, at 16-17. The agency states that while offerors were instructed to use HUD's Strategy system, they were not prohibited from proposing their own data system to augment Strategy; they could not, however, use their own data system in place of Strategy. The agency states that offerors were also instructed that their computer system could not interface with HUD's system. Id. at 19-21. HUD maintains that, consistent with the instructions to offerors, D&T proposed its own system to augment Strategy, and that D&T's approach does not assume an electronic interface between Strategy and D&T's systems.

It is thus undisputed that offerors were expected to use HUD's Strategy system, and were further instructed not to assume that HUD would permit an electronic interface between Strategy and their own system. The issue presented for our resolution,

therefore, is whether in issuing the order to D&T, HUD disregarded these instructions and effectively waived the requirement that offerors use Strategy, or relaxed the prohibition against assuming an electronic interface between HUD's system and D&T's systems.

In response to phase I of the competition, D&T provided a statement of its qualifications and past performance in which the firm explained that it would be teaming with The Clayton Group, Inc. to perform the required services. AR, exh. 4, D&T's Nov. 30, 1998 response to RFP, at 4. In this connection, D&T explained that it would use its experience to develop and manage a comprehensive quality control program tailored to the solicitation's requirements, while personnel from its teaming partner would perform all other servicing and asset sale support functions. Id. Regarding Clayton's loan servicing capabilities, D&T's response stated as follows:

> Clayton's performing loan servicing and administration units operate from a [DELETED], which is electronically wrapped by ARSENAL, an industry-leading, proprietary, default management operating system.

Id.

In its business proposal, under a section entitled "Equipment," D&T describes its proposed systems as follows:

> Systems - The Deloitte/Clayton Team utilizes a [DELETED] servicing platform for Loan Administration functions. The system is year 2000 compliant and fully capable of accepting the 12,673 loans contemplated under this contract. As required by HUD, Deloitte/Clayton is prepared to utilize the new Strategy loan servicing system. However, we strongly recommend an interface that would allow Strategy and [DELETED] to run concurrently. This interface will significantly reduce the unit cost of servicing each loan, by automating critical servicing functions including escrow analysis, collection letters and reporting. Our pricing is based on this system interface. The per-unit price will increase if servicing functions that are normally automated have to be performed manually.
>
> [DELETED] is electronically wrapped by ARSENAL, an industry leading, proprietary, default management operating system. ARSENAL . . . is one tool in the Clayton Technologies suite . . . that utilized together, provide unequaled loan analysis, management and reporting capabilities.

AR, exh. 12, D&T Business Proposal, Dec. 11, 1998, at 5 (emphasis added).

Under a section entitled "ROUTINE SERVICING," D&T's proposal further explained that "[DELETED] has the built-in capabilities to track escrow, complete escrow analysis and [produce] year-end statements." Id. at 8. D&T's proposal further states that "[i]t is our intent, with the approval of the GTR and the GTM to build a bridge between our servicing system, our default system and Strategy, to enable HUD to receive both their own reports and take advantage of the robust reporting capabilities of our proprietary software." Id. Under a section entitled "REPORTING," the proposal explains the various reporting capabilities and benefits to HUD, and specifically states that "ARSENAL will seamlessly interface with the HUD systems." Id. at 23. D&T further explained during discussions that if [DELETED] cannot be electronically linked with HUD's Strategy system, the value of ARSENAL to HUD would decrease dramatically. AR, exh. 15, Video Recording of D&T's Discussions.

The agency's argument that D&T's approach did not involve an electronic interface is further undermined by the following exchange between HUD's Director of Denver Field Contracting Operations (DDFCO) and D&T during oral discussions:

> DDFCO: I still have one question on the interface that you have that you're going to need--it's not . . . I don't know how much of that is integral to your proposal but we don't know yet whether there actually can be an interface at our headquarters which will allow an interface to a HUD system to be developed. . . . So, I don't know how critical that is to your proposal.
>
> . . . . .
>
> D&T: And I think the challenge that you're giving me that I want to make sure I measure ourselves against is we may have priced this to be overly efficient on the assumption that we could do an electronic bridge. So I think we need to make sure that what happens to our pricing if we can't, because I think we've been operating on the assumption that that's imminently do-able and it may be a bad assumption.

HUD's Post-Hearing Comments, May 6, 1999, attach. 3, transcript of portions of Dec. 15, 1998 discussions with D&T, at 2.

The record is thus clear that based on HUD's review of D&T's proposal, as shown by the exchange during oral discussions quoted above, HUD understood that D&T proposed an electronic interface between its data systems and HUD's Strategy. Further, D&T made it clear both in its proposal and during discussions that its pricing assumed that the agency would permit

an electronic interface between the agency's and D&T's system. HUD's assertion, therefore, that there is "no electronic connection shown between [D&T's] system and HUD's Strategy system," HUD's Post-Hearing Comments, May 6, 1999, at 12, not only disregards the facts in the record, but is inconsistent with D&T's own explanation that its systems will "seamlessly" interface with HUD's system, and that its pricing was based on the existence of that electronic interface.

It is a fundamental principle of government procurement that offerors must be provided with a common basis for the preparation of their proposals. Meridian Management Corp.; Consolidated Eng'g Servs., Inc., B-271557 et al., July 29, 1996, 96-2 CPD ¶ 64 at 5. Thus, award must be based on the requirements stated in the solicitation, and offerors notified of the government's changed or relaxed requirements. Id. We will sustain a protest where an agency, without issuing a written amendment, fails to notify all offerors of its changed requirements or relaxes an RFP specification to the protester's possible prejudice (e.g., where the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements). Container Prods. Corp., B-255883, Apr. 13, 1994, 94-1 CPD ¶ 255 at 4.

The record shows that HUD wanted to ensure that the offerors used Strategy, and made this clear during the preproposal conference. Further, while offerors could propose to use their own data systems, they were specifically instructed not to assume that HUD would permit an electronic interface between their own systems and Strategy. Based on our review of the entire record, including D&T's statement of qualifications and experience submitted during phase I of the competition, its business proposal, and the transcript of the video recording of its discussions, we conclude that by issuing D&T the order, HUD essentially waived the instructions given offerors concerning the interface, and improperly accepted a proposal which relied significantly on the existence of that interface. Although D&T's proposal states that the firm is prepared to use HUD's Strategy system, it is clear that the firm's entire approach to loan servicing and reporting significantly relies on, and assumes, the existence of an electronic interface between HUD's Strategy system and Clayton's servicing software to perform the contract. Indeed, the awardee specifically stated that D&T's pricing is based on such an assumption; that, without the interface, the value of D&T's ARSENAL system to HUD would decrease dramatically; and that, without the interface, D&T's price would increase because critical servicing functions that are normally automated (e.g., escrow analysis, collection letters, and reporting) will have to be performed manually. The agency's action prejudiced the protester because ACS was not notified of the waiver and its approach was premised on using HUD's Strategy system and its own data system concurrently, without assuming an electronic interface between its own systems and Strategy. Given the significant

difference between the vendors' prices--and in light of the fact that without an interface, D&T's total price is likely to increase--and the closeness of the final technical scores, we think that there is a reasonable possibility that ACS was prejudiced by the agency's waiver of the stated instructions. Accordingly, we sustain this aspect of the protest.

Evaluation of D&T's Prior Experience

ACS argues that HUD improperly evaluated D&T's proposal under the prior experience evaluation factor. Specifically, ACS contends that HUD unreasonably rewarded D&T for having corporate experience "the same as or substantially similar to" that required by the solicitation, which D&T did not demonstrate in its proposal.

The agency takes the position that this evaluation factor did not require that corporate experience and key personnel be separately evaluated. As such, the agency contends that the evaluation of D&T's proposal was reasonable because the evaluators considered the experience of its key personnel to satisfy the criterion.

Under the FSS program, agencies are not required to request proposals or to conduct a competition before using their business judgment in determining whether ordering supplies or services from an FSS vendor represents the best value and meets the agency's needs at the lowest overall cost. FAR §§ 8.401, 8.404(a); Amdahl Corp., B-281255, Dec. 28, 1998, 98-2 CPD ¶ 161 at 3. Where, as here, an agency conducts a competition, however, we will review the agency's actions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. Information Sys. Tech. Corp., B-280013.2, Aug. 6, 1998, 98-2 CPD ¶ 36 at 3; COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5. We have reviewed the individual evaluators' worksheets, the TEP's consensus evaluation reports, and the award recommendation memorandum, and find that the evaluation of D&T's proposal under the prior experience factor was unreasonable.

The RFP explains the purpose of the contemplated contract, in part, as follows:

> The purpose of this contract is to engage a loan servicing organization to perform a full range of comprehensive servicing of the Department's Secretary-held Single Family mortgage portfolio. These services will range from the initial loan set-up, to the servicing of the loan, to the accounting related functions (perform disbursement data review and entry functions, print and mail checks, accounts receivable and payable, and financial adjustments), to the satisfaction of the mortgage or to ensure completion of legal actions, if appropriate.

> In addition, the contractor shall also be responsible for servicing the Department's Loss Mitigation Partial Claims Mortgages and their legal instruments.

RFP § C-1, ¶ 1.1.

The RFP estimated that the successful contractor would provide comprehensive servicing for more than 12,000 Secretary-held single family mortgages, and more than 1,000 partial claim subordinate mortgages. Id. § C, Technical Exh. 2. The CO states that the majority of the mortgages currently in the loan servicing portfolio are considered delinquent. CO's Statement, Mar. 30, 1999, at 1.

In order to evaluate the offerors' prior experience, firms were required to provide "evidence of [their] corporate and staff experience in servicing a large portfolio of delinquent loans" during the 5 years immediately preceding the solicitation. RFP § E, ¶ 1.7(a)(2)(iv).[4] In addition to the information required by the RFP, by letter dated November 19, 1998, HUD requested the following specific information from each offeror:

> Provide evidence of your corporate and staff experience in performing work and providing deliverables the same as, or substantially the same as the primary services required [by the RFP] during the five (5) years immediately preceding this solicitation. This includes any key personnel, subcontractors, partnerships, etc. necessary to perform the primary services required.
>
> Provide a list of all clients including Federal, state and local governments and commercial customers for whom you performed the same or similar services as those required during the five (5) years immediately prior to this solicitation which includes the following: Name of the contracting office, contract number, total contract value,

[4]Testimony at the hearing shows that at least two members of the TEP did not consider the 5 years to be a "minimum requirement," Hearing Transcript (Tr). at 56, 156, while the TEP Chairperson testified that offerors were required to have a minimum of 5 years experience immediately prior to the solicitation in servicing a large portfolio of delinquent loans. Tr. at 224. It thus appears that the 5 year requirement for servicing loans was not consistently applied by the evaluators. The record further shows that, in its report to the CO, the TEP concluded that ACS "meets the 5 year minimum requirement of for loan servicing . . . ." AR, exh. 51, Memorandum from the Chairperson, TEP, to the CO at 3 (Jan. 4, 1999). However, the TEP report makes no similar assessment with respect to D&T.

> contracting officer name and telephone number, program manager name and telephone and list of major subcontractors.
>
> Provide evidence of your successful performance of work—including meeting delivery dates and schedules the same as or substantially similar to that required during the five (5) years immediately preceding this solicitation.

AR, exh. 2, HUD letters to offerors, Nov. 19, 1998, at 1.

Here, the solicitation and the agency's request for information quoted above clearly indicated that HUD considered a firm's experience to be different from its employees' individual experience. The RFP specifically requested offerors to provide evidence of their corporate and staff experience in servicing a large portfolio of delinquent loans. RFP § E, ¶ 1.7(a)(2)(iv). Offerors were also instructed to provide evidence of their corporate and staff experience pertinent to performing work the same as, or substantially similar to, the primary services required by the RFP during the past 5 years. Although the RFP stated that both corporate and personnel experience were to be evaluated under the prior experience factor, given the reference in the RFP to corporate and staff experience, id., and the type of information HUD specifically requested in its November 19 letter, we conclude that, contrary to the agency's position, under this evaluation factor, the RFP clearly contemplated a separate evaluation of corporate and key personnel experience.[5]

Our review of the record, including testimony at the hearing, shows that the TEP's conclusion was based almost entirely on its evaluation of D&T's proposed key personnel, and that the TEP did not conduct a separate evaluation of the firm's corporate experience. The TEP awarded D&T's proposal 23 out of 25 points under the prior experience factor. AR, exh. 46, TEP Final Consensus Score Sheet, at 6th unnumbered page. The TEP found that as a company, including its key personnel, D&T "has been performing the primary services required under this contract for a large portfolio of delinquent loans for a significant portion of the five years immediately preceding the solicitation." Id. The TEP further noted that D&T had demonstrated

[5]In further support of our conclusion, we note that in the individual evaluator score sheets and the consensus score sheets, in order for a proposal to earn a "high" score (17-25 points) under the prior experience evaluation factor, the offeror had to clearly demonstrate that both as a company and its key personnel had been performing the primary services required under the RFP for a significant portion of the 5 years immediately preceding the solicitation. If the offeror was lacking either in corporate or key personnel experience, the proposal could earn only a "medium" score (8-16 points). AR, exhibits 28, 29, at 6th unnumbered page.

"extensive experience servicing large portfolios of delinquent loans both in the private and public sector," id., and concluded that D&T "has clearly demonstrated extensive ability in delinquent loan servicing both in the public and private sector." Id. at 7th unnumbered page. We have reviewed the evaluation record, including the individual evaluators' score sheets, D&T's proposal, and the video recording of D&T's oral presentation, and conclude that the TEP's conclusions are not supported by the record. Below we discuss some examples of the projects the TEP relied on in its evaluation in support of our conclusion.

In its proposal, D&T described a project in support of the Government National Mortgage Association (Ginnie Mae). According to the proposal, D&T "was awarded a multi-year task order contract to support Ginnie Mae's Office of Finance in evaluating, developing and implementing information and risk management systems." AR, exh. 4, at 29. The proposal further explains that D&T was "awarded several tasks to address the operational procedures and information systems of Ginnie Mae's Office of Asset Management." Id. One TEP member, who awarded D&T's proposal the maximum number of points available in this area, testified that while this particular experience is in developing a desk guide for loan servicing, it is not loan servicing. Tr. 68, 69. With respect to D&T's corporate experience generally, one evaluator testified that D&T has experience in performing loan servicing reviews, which is different from actually performing loan servicing. Tr. at 65, 66. This evaluator simply could not point to any project where D&T had demonstrated in its proposal having extensive experience in performing loan servicing on large delinquent portfolios in the private sector. Tr. 73, 74. Further, this evaluator could not point to anything in the record to show that D&T had experience in direct loan servicing in either the private or public sector because, according to the witness, D&T does not service loans. Tr. 68-70. Another evaluator who awarded D&T's proposal 17 points in this area also testified that D&T, as a company, does not have any experience servicing a large portfolio. Tr. 166. In our view, the corporate experience D&T described in its proposal, particularly its work with Ginnie Mae, clearly did not demonstrate that the firm had provided comprehensive servicing of a large portfolio of delinquent single family mortgages as contemplated by HUD's solicitation.

D&T also relied on work performed by its teaming partner, The Clayton Group, and included six projects to satisfy the corporate experience requirement. D&T described the first project, with [DELETED] Bank, as related to delinquency problems with various consumer loan portfolios secured by auto leases and loans, unsecured line of credit portfolios, and mortgage portfolios. The period of performance for this contract was from January to April 1998. AR, exh. 4, D&T's proposal, Nov. 30, 1998, at 38. Although the proposal states that this portfolio consisted of 40,000 loans and references "mortgages," there is nothing in the record to indicate how many loans within this portfolio were

single family mortgages. Tr. 79, 80. Further, it is clear that the contract was primarily for the collection of delinquent auto loans and leases. Specifically, D&T's proposal states that The Clayton Group was retained to resolve an "unacceptably high delinquency rate in [DELETED] automobile loan and lease portfolio." AR, exh. 4, D&T's proposal, Nov. 30, 1998, at 32, 40. Resolving delinquent auto loans and leases, however, is not the same as servicing single family mortgages. For instance, one evaluator testified at the hearing that servicing mortgages is much more complex than servicing auto loans, in that servicing a delinquent first mortgage loan requires "much more intensive labor" and generally involves relatively complex functions (e.g., escrows, paying taxes), which are not usually involved in servicing auto loans. Tr. 59-60. In our view, this contract to resolve delinquent auto loans and leases, clearly does not demonstrate corporate experience the "same as or similar to" providing comprehensive servicing to more than 12,000 delinquent single family mortgages as contemplated by HUD's solicitation.

The Clayton Group describes another project, with [DELETED], as "servicing transfer" of a non-performing loan portfolio. AR, exh. 4, D&T's proposal, Nov. 30, 1998, at 33. Based on the information in D&T's proposal, one evaluator testified that this entire portfolio consisted of approximately 200 to 250 loans. Tr. 77, 78. According to D&T's proposal, this portfolio initially consisted of non-performing loans secured by real estate and some unsecured loans. D&T states in its proposal that [DELETED] employed Clayton to initialize customer contact and counsel the borrowers regarding their loan status to resolve delinquencies. AR, exh. 4, D&T's proposal, Nov. 30, 1998, at 41. This relatively small contract, however, does not appear to involve services that are the "same" as or "similar" to the full range of comprehensive loan servicing contemplated by HUD's solicitation.

Consistent with our conclusion that the contracts cited in D&T's proposal fail to show the required corporate experience, the agency's evaluation record similarly lacks any support to show that D&T's corporate experience is relevant to the contemplated contract. For example, one evaluator, who awarded D&T's proposal a perfect score of 25 points in this area, generally noted D&T's experience of approximately 25 years; that reference checks were excellent; and that D&T had provided an "extensive organizational chart demonstrating knowledge of servicing." AR, exh. 29, Individual Score Sheet, at 6th unnumbered page. However, except for those cursory comments, that document contains no description or discussion of how D&T's experience is relevant to or is the same as or substantially similar to the work contemplated under HUD's solicitation, especially since the record shows that the firm does not perform loan servicing. Likewise, in its recommendation, with which the SSO concurred, the TEP specifically noted that D&T had demonstrated "extensive experience conducting full servicing of seriously delinquent loan portfolios in the public and private sector," and cited as examples [DELETED]." AR, Tab 50, Memorandum from the CO to the SSO at 7 (Dec. 31, 1998). Our review of D&T's proposal reveals no description of a

[DELETED][6] contract, however, and, as discussed above, The Clayton Group's [DELETED] contract involved collection of delinquent auto loans and leases, which, in our view, is not "the same as or similar to" providing comprehensive servicing to a large portfolio of single family mortgages as contemplated by HUD's solicitation.

Agencies are required to document their selection decisions so as to show the relative differences among proposals, their weaknesses and risks, and the basis and reasons for the selection decision. FAR §§ 15.305(a), 15.308; Department of the Army--Recon., B-240647.2, Feb. 26, 1991, 91-1 CPD ¶ 211 at 2. Where there is inadequate supporting rationale in the record for the source selection decision, we cannot conclude that the agency had a reasonable basis for its decision. See American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53 at 6. Based on our review, we think that the TEP's conclusion that D&T demonstrated "extensive experience" in providing the full range of loan servicing to a large portfolio of delinquent mortgage loans is not supported by the record. Accordingly, we think that the evaluation of D&T's proposal under the prior experience factor was flawed, and we sustain this aspect of ACS's protest as well.

Discussions

ACS argues that the agency did not conduct meaningful discussions with the firm. In support of its argument, ACS points out that in its report to the CO, the TEP expressed concern that between the base and option years, ACS's proposal reflected an increase in price per account serviced, and that ACS had not adequately explained this increase. ACS maintains that since its price was of material concern to the TEP in its recommendation, and was also a concern expressed by the SSO, HUD should have given the firm an opportunity to address this during discussions.

The FAR requires that contracting officers discuss with each offeror being considered for award "significant weaknesses, deficiencies, and other aspects of its proposal . . . that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." FAR § 15.306(d)(3). The statutory and regulatory requirement for discussions with all competitive range offerors (41 U.S.C. § 253b(d)(1)(A) (1994); FAR

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[6]We note that during its oral presentation, a D&T senior partner briefly mentioned D&T's experience with "large contracts," citing [DELETED] as an example. Except for naming that company, however, D&T did not explain the nature of the [DELETED] contract or provide any details that could reasonably support the TEP's conclusion that D&T had demonstrated "extensive experience conducting full servicing of seriously delinquent loan portfolios in the public and private sector." In fact, the record shows that D&T does not perform loan servicing.

§ 15.306(d)(1)) means that such discussions must be meaningful, equitable, and not misleading. Du and Assocs., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156 at 7. Discussions cannot be meaningful unless they lead an offeror into those weaknesses, excesses or deficiencies of its proposal that must be addressed in order for it to have a reasonable chance of being selected for award. Eldyne, Inc., B-250158 et al., Jan. 14, 1993, 93-1 CPD ¶ 430 at 6, recon. denied, Department of the Navy--Recon., B-250158.4, May 28, 1993, 93-1 CPD ¶ 422.

Here, the record shows that in its recommendation to the CO, the TEP expressed concern that ACS's proposal reflected a "large increase between the price per account from ACS for the first year versus the following option years." AR, exh. 51, Memorandum from the Chairperson, TEP, to the CO at 6 (Jan. 4, 1999). The TEP further stated that ACS had not adequately explained this increase, and that it assumed that ACS was "counting on getting the award with [its] lower bid and then HUD would have a note sale and [ACS] would actually make a large amount of money." Id. In other words, the TEP believed that ACS's price was an attempt at "buying into" the contract and assumed that HUD would conduct a note sale during the option years, thus resulting in an unreasonable increase in price per account serviced. The record further shows that the SSO concurred with this assessment and also expressed this concern in his selection decision. AR, exh. 56, Memorandum from the SSO to the CO at 3rd unnumbered page (Jan. 19, 1999). While the record is not clear as to what impact ACS's pricing methodology had on the TEP's recommendation or on the SSO's selection decision, it is clear that, at a minimum, it was of sufficient concern for the evaluators to raise it in the TEP's report to the CO, and that the SSO agreed with the TEP's view that ACS had not adequately explained its pricing strategy. Despite this stated concern, however, there is no evidence in the record that HUD raised this issue during its discussions with ACS. We therefore agree with ACS that discussions with the firm regarding its price were not meaningful.[7]

Recommendation

We recommend that the agency reopen discussions with ACS and D&T, and request FPRs from these two firms, including business proposals. Since it is clear from the record that the agency has not changed its position that offerors are prohibited from proposing to use an electronic interface, the proposals should be evaluated accordingly. During discussions, HUD should afford ACS

[7]Because our recommendation that the agency reopen discussions and request another round of FPRs renders the remaining protest issues academic, we need not address them here.

an opportunity to explain its pricing methodology. We also recommend that the agency reevaluate D&T's proposal under the prior experience evaluation factor in accordance with this decision. If upon reevaluation, the agency determines that D&T's proposal does not represent the best value to the government, HUD should terminate the order issued to D&T and issue the order to ACS. We also recommend that ACS be reimbursed its costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1999). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Aerospace Group, Inc.

File: B-281958; B-281959

Date: May 10, 1999

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.
Mike Friedman for Airport Metals, an intervenor.
Lillian Weiss, Esq., Defense Logistics Agency, for the agency.
Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Placement of an order at a significant price premium for the sole reason that the vendor quoting a lower price has no prior performance history in supplying the item being procured was unreasonable, where determination was not made in accordance with the stated evaluation scheme.

DECISION

National Aerospace Group, Inc. protests the issuance of purchase orders for sheet metal to other firms under request for quotations (RFQ) Nos. SPO500-99-T-A426 (RFQ-A426) and SPO540-99-Q-A152 (RFQ-A152) by the Defense Logistics Agency (DLA), Defense Industrial Supply Center (DISC). National argues that its quotations represented the best value under these two RFQs.

We sustain National's protest of the order under RFQ-A426, and deny National's protest under RFQ-A152.

RFQ-A426 was a simplified acquisition using the agency's automated purchase procedures. Under these procedures, RFQs are transmitted directly to an electronic bulletin board (EBB) maintained by the agency. Firms desiring access to the EBB to review the RFQs and to submit quotations are required to first register with the agency by completing a small purchase agreement (SPA). Once registered, vendors can then access the EBB either through a service or using their own personal computers via the Internet. Contracting Officer's Statement at 1; see Commonwealth Indus. Specialties, Inc., B-277833, Nov. 25, 1997, 97-2 CPD ¶ 151 at 2-3; Arcy Mfg. Co., Inc.; Beard Servs., Inc.; Keys Wholesale, Inc.; Craftmaster Hardware Co., Inc., B-261538 et al., Aug. 14, 1995, 95-2 CPD ¶ 283 at 1-2. The SPA, which every

supplier must sign in order to obtain a password to submit quotations on the EBB, and which was applicable to this RFQ, provides as follows:

> DISC purchases at or below the SAT [simplified acquisition threshold] are subject to Best Value Buying techniques. This includes, but is not limited to, the Blue Chip Vendor Program, the Delivery Evaluation Factor Program, and Contracting Officer's individual determinations based on a comparative assessment of pertinent circumstances, including past performance, delivery and product quality.

DISC Small Purchase Agreement, Modification, at 2nd unnumbered page.

RFQ-A426 sought prices for metal sheets with a specified dimension for delivery within 120 days after the date of order. Contracting Officer's Statement at 2. The agency received four acceptable quotations in response to RFQ-A426. National submitted the low quotation at a price of $10,500, with delivery within 45 days from the date of the order. Tara Metals submitted a quotation of $13,083 with delivery within 70 days from the date of order. Agency Report, Tab 4, EBB Quotation Abstract for RFQ-A426. The agency evaluated vendors under the Automated Best Value Model (ABVM). Contracting Officer's Statement at 2. ABVM is an automated system that collects a vendor's past performance data for a specific period and translates it into a numeric score. Tara had an ABVM score of 95.4. National, which was a relatively new supplier, was given a rating of 999.9 because it lacked a performance history for this item. Id.; Agency Report, Tab 6, ABVM Rating Printout. Under the ABVM procedures, a supplier with no performance history is assigned a rating of 999.9, which is referred to in the record as a neutral rating. Contracting Officer's Statement at 2.

The record also includes a facsimile sent at 9:15 a.m. on January 20, 1999 from National responding to an inquiry from the agency in which National advised the agency that the "material quoted as called out . . . no exceptions . . . . We have in stock." Protest, exh. 3. The award justification document, signed and dated on January 20, 1999, was a preprinted form, which permitted the contracting officer to select one of a variety of reasons for the award. Here, in pertinent part, the contracting officer completed the form as follows: "Lower priced offer(s) not selected because: . . . Other score(s) not a true indicator of performance because score(s) based on too few contract line items." Agency Report, Tab 7, Award Justification.

There is no other contemporaneous award documentation. In her statement to our Office in the agency report, the contracting officer states that, "[e]ssentially, [she] determined that Tara, who had a composite ABVM score of 95.4 represented a lesser risk of nonperformance than did [National] who had a neutral rating of 999.9 because it is a relatively new supplier." Contracting Officer's Statement at 2.

National argues that the award to Tara was unreasonable and not supported by the record. National points out that its quotation was significantly less expensive than Tara's; that it quoted a shorter delivery time than Tara; and that in response to the agency's apparent concern about its capability to supply the item, it confirmed that it could furnish the item. National argues that it was improperly penalized without any justification for a lack of previous performance history. National asserts that the agency's selection decision violates the ABVM notice provision which provides, in pertinent part, that "[a]n ABVM score does not determine an offeror's award eligibility, or technical acceptability," and that "[n]ew offeror status will not be grounds for disqualification for award." Protester's Comments, attach., DISC clause 52.215-9112(e).

Simplified acquisition procedures are designed to, among other things, reduce administrative expenses, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors. Federal Acquisition Regulation (FAR) § 13.002. Although the procedures for simplified acquisitions do not require detailed justifications supporting a best value determination, the FAR requires that the contracting officer evaluate quotations "on the basis established in the solicitation" and support "the award decision if other than price-related factors were considered in selecting the supplier." FAR §§ 13.106-2(a)(2), 13.106-3(b)(3)(ii). Thus, even when using such procedures, an agency must conduct the procurement consistent with a concern for fair and equitable competition and must evaluate quotations in accordance with the terms of the solicitation. See Sawtooth Enters., Inc., B-281218, Dec. 7, 1998, 98-2 CPD ¶ 139 at 3; Nunez & Assocs., B-258666, Feb. 10, 1995, 95-1 CPD ¶ 62 at 2. In reviewing protests against an allegedly improper simplified acquisition evaluation and selection decision, we examine the record to determine whether the agency met this standard and exercised its discretion reasonably. Id. Here, we conclude that the selection decision was flawed because it is inadequately supported and was not based on the criteria announced in the SPA.

The SPA, which established the terms and conditions for this EBB acquisition, stated that the contracting officer would use best value techniques and make an individual determination based on a comparative assessment of pertinent circumstances, including past performance, delivery and product quality. The contracting officer states that she used the ABVM to perform this comparative assessment. Contracting Officer's Statement at 1, 4. As quoted above, the sole reason for paying a significant price premium for Tara was that National's ABVM score was not a true indicator of past performance because it was based on too few contract lines. Agency Report, Tab 7, Award Justification.

In a recent case involving DLA's use of ABVM scoring, we concluded that the use of a neutral rating approach to avoid penalizing a vendor without prior experience does not preclude a determination to award to a higher-priced firm with a good past performance record over a lower priced vendor with a neutral past performance rating. Indeed, such a determination is inherent in the concept of best value. Phillips

Indus., Inc., B-280645, Sept. 17, 1998, 98-2 CPD ¶ 74 at 5. In Phillips, the contracting officer's determination to select a higher priced vendor with an excellent ABVM score, rather than a new supplier with a neutral rating, was reasonable where the record in that case showed that the agency had backorders for the item and timely delivery was critical. Nonetheless, we expressed concern that the vendor without a performance history not be disqualified from award merely because it lacked a performance history; we pointed out that such an approach would be inconsistent with the FAR and the DLA ABVM clause. Id. As DLA recognized in that case, FAR § 15.305(a)(2) provides that in the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance. See 41 U.S.C. § 405(j)(2) (1994). The ABVM clause states that lack of performance history is not grounds for disqualification for award. Protester's Comments, attach., DISC clause 52.215-9112(e).

There is nothing in the record to show that the contracting officer performed a comparative assessment of the vendors. The contracting officer merely checked a box on a form indicating that National was not selected because its 999.9 ABVM score was based on insufficient information and, therefore, was not a true indicator of its capabilities. Nor is there any indication that the contracting officer performed a tradeoff that considered the significant price premium in ordering from Tara, or that the contracting officer considered in her decision that National quoted a significantly shorter delivery time and confirmed that the metal sheets were in stock. Unlike in Phillips, there is no indication here that the item was in backlog or high demand status or that timely delivery was critical and worth the price premium to avoid the risk of using a vendor with no performance history. We conclude that the contracting officer failed to make a meaningful best value determination consistent with the SPA to justify paying a significant premium to Tara. As a result, DLA's decision was tantamount to rejecting National's quotation based on its lack of past performance history, which is inconsistent with 41 U.S.C. § 405(j)(2), FAR § 15.305(a)(2), and the clauses which implement the ABVM program, as discussed in the Phillips decision. We therefore sustain National's protest of the order to Tara under RFQ-A426.

We deny National's protest of the order to Airport Metals under RFQ-A152. Airport Metals was the low priced vendor, had a ABVM score of 98.4, and quoted a significantly shorter delivery time than National. Agency Report, Tab 9, RFQ-A152 Abstract. We think the contracting officer's selection of Airport Metals in these circumstances was amply justified. Although National challenges Airport Metals' ABVM score, we have no basis to question the score on this record.
For RFQ-A426, we recommend that the contracting officer perform a proper best value determination consistent with this decision, and issue an order appropriate with that best value determination. In any event, National should be reimbursed the costs of filing and pursuing its protest of RFQ-A426, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1998). National should submit its certified claim,

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Metro Machine Corporation

File: B-281872; B-281872.2; B-281872.3; B-281872.4

Date: April 22, 1999

Frederick W. Claybrook, Jr., Esq., James J. Regan, Esq., John E. McCarthy, Jr., Esq., and Daniel R. Forman, Esq., Crowell & Moring, for the protester.
James A. Kelly, Esq., Donald A. Tobin, Esq., and Lori Ann T. Lange, Esq., Bastianelli, Brown & Kelley, for Atlantic Dry Dock Corporation, an intervenor.
Susan P. Raps, Esq., Craig L. Kemmerer, Esq., Stephen P. Anderson, Esq., Catherine Rubino, Esq., Lisa L. Hare, Esq., Frank A. Putzu, Esq., and Jannika E. Cannon, Esq., Department of the Navy, for the agency.
Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where source selection authority considered protester's proposed approach to perform production shop work at a remote location to be unacceptable, and believed that the solicitation requirements established that only a proposal to perform production shop work on-site would be acceptable, agency misled protester during discussions by effectively communicating that modifications or enhancements to the protester's proposal to perform production shop work at the remote location would be sufficient to make proposal of that location acceptable.

DECISION

Metro Machine Corporation protests the Department of the Navy's award of a contract to Atlantic Dry Dock Corporation (ADD) under request for proposals (RFP) No. N62678-98-R-0025 for drydocking operations and ship repair work for four classes of Navy ships homeported at the Mayport Naval Station in the Jacksonville, Florida area. Metro raises a number of protest issues, most significantly that the agency failed to conduct meaningful discussions.

We sustain the protest.

BACKGROUND

On March 4, 1998, the Navy issued the RFP at issue for drydocking facilities and repair services for four classes of Navy ships over a 5-year period. The solicitation provided that offerors could propose to use, as government-furnished property, a Navy floating drydock with the designation "AFDM-7" and the name *Sustain* which is currently in the Navy's inactive fleet, or alternatively, a contractor-furnished drydock. The RFP contained multiple contract line item numbers (CLIN), each of which specified certain contract requirements. CLIN 0001 called for preparing the site, towing, setting up the dry dock, and obtaining certification. CLIN 0002 (and corresponding option year CLINs) called for operation and normal maintenance of the proposed dry dock. CLIN 0003 (and corresponding option year CLINs), which was applicable only to offerors proposing to use the *Sustain*, called for repairs to the *Sustain* which exceeded the normal maintenance contemplated under CLIN 0002. CLINs 0004 through 0007 (and corresponding option year CLINs) called for specific work to be performed on each of the four different classes of Navy ships to be serviced at the dry dock.[1] RFP attachment J-5 listed 22 ships which the Navy contemplated would be drydocked and repaired under this procurement, stating:

> Twenty-two (22) ships make up this requirement. Currently, there are twelve (12) CNO drydocking availabilities scheduled for FY-99 [fiscal year 1999] thru FY-03 [fiscal year 2003]. All of these vessels are subject to unscheduled, emergent drydockings.

Section M of the RFP provided that proposals would be evaluated on the basis of six non-price evaluation factors which, taken together, were significantly more important than price. RFP § M.1.B. The RFP provided that two of the non-price evaluation factors--facility site requirements and contractor-furnished drydock requirement--would be evaluated on a pass/fail basis.[2] Id. §§ M.2.1, M.2.2. The four

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[1]CLIN 0004 contemplated work on FFG-class vessels; CLIN 0005 contemplated work on DDG-class vessels; CLIN 0006 contemplated work on CG-class vessels; and CLIN 0007 contemplated work on DD-class vessels. For each of these CLINs, the RFP contained an extensive list of possible work to be performed. Offerors were required to submit fixed prices for each listed item, and the RFP contemplated issuance of delivery orders specifying the particular work to be performed for each drydocked vessel.

[2]With regard to the facility site requirements evaluation factor, section M.2.1 stated: "[t]he site proposed for the dry dock must meet all distance, commute time, water depth, and access requirements stated in Section C of the solicitation." With regard to contractor-furnished dry dock requirements evaluation factor, section M.2.2 stated: "the proposed dry dock must have the capacity and size requirements to dry dock the ships as stated in Section C of the solicitation."

remaining non-price evaluation factors, listed in descending order of importance, were: technical;[3] earliest date able to commence drydock operations; environmental impact; and past performance. RFP § M.1.C.

Regarding evaluation under the most important "technical" factor, RFP section M.2.3 stated:

> Technical (Organization and Management, Manpower, and Facilities) will be evaluated to determine the offeror's overall risk in being able to perform the requirements of this contract relative to operating and maintaining the dry dock and performing the required dry dock repairs to applicable ships.

Regarding evaluation of price proposals, RFP section M.3 provided that proposals would be evaluated by adding the total prices proposed for all CLINs, except CLIN 0003 (and corresponding option year CLINs),[4] and that price proposals "will be reviewed for . . . cost to the Government to accomplish the requirements of the solicitation."

Metro and ADD submitted proposals by the May 15, 1998 closing date. ADD proposed to use the government-furnished dry dock, *Sustain*, at ADD's facility in Jacksonville. Metro proposed to use its own dry dock, the *Old Dominion*, at a site to be leased from the Jacksonville Port Authority (JPA). Metro also proposed to perform required production shop work[5] at its facility in Norfolk, VA.[6]

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[3]The technical evaluation factor contained three subfactors: organization and management, manpower, and facilities. RFP § L.2.7, at 206-07.

[4]Section M provided that, for evaluation purposes, $650,000 would be added as an evaluation factor for CLIN 0003 and each corresponding option year CLIN for proposals offering to use the *Sustain*. RFP § M.3.

[5]Production shop work generally includes machine shop work, pipe shop work, electrical shop work, steel and aluminum fabrication, and sheet metal work.

[6]The Navy was aware that Metro had previously used its Norfolk production shop to successfully perform drydocking and repair of Navy ships at remote locations. In evaluating Metro's past performance, the agency stated: [deleted].

In evaluating Metro's proposal, the technical proposal evaluation team (TPET) expressed concern regarding Metro's proposed performance of production shop work in Norfolk, stating:

> [deleted]

TPET Summary Report, July 15, 1998 at 9.

On July 17, written discussion questions were sent to both offerors. Only one of the 14 agency questions addressing Metro's technical proposal referenced Metro's proposed use of its Norfolk production shop facilities. That question stated:

> It is noted that you expect to heavily utilize Norfolk facilities and resources. What actions do you propose to mitigate the problems associated with the physical distance between Jacksonville and Norfolk?

Letter from the Contracting Officer to Metro Machine Corp. enclosure 1, at 3 (July 17, 1998).

Final revised proposals were submitted by Metro and ADD on September 1. In response to the agency question quoted above, Metro specified the proposed actions that it believed would mitigate the potential problems posed by its proposal to perform production shop work in Norfolk, stating:

> [deleted]

Metro Final Revised Proposal, Responses to Q&A, at 20-21.

The agency's contemporaneous evaluation documentation shows that the agency found Metro's final revised proposal to be unacceptable. Specifically, the source selection document states:

> [deleted]

Business Clearance Memorandum, Dec. 21, 1998, at 9-10.

In part because the agency's documentation regarding its determination that Metro's proposal was unacceptable incorporated several different factors, GAO conducted a hearing to clarify the specific basis for the agency's determination that Metro's

proposal was unacceptable.[7] At that hearing, the source selection authority (SSA) testified as follows:

> Q. [D]id the Navy know, at the time the discussion questions were sent, did the Navy believe at that time that [Metro's] proposing production facilities in Norfolk failed to meet the RFP requirements?
>
> A. Yes.
>
> . . . . .
>
> Q. It's my recollection that you testified earlier that you believed . . . Metro's proposal with regard to the production shop facilities in Norfolk made it -- from that you concluded that the proposal failed to meet certain RFP criteria, am I correct?
>
> A. Yes.
>
> Q. In your mind, as of the final evaluation, in your mind, did the proposal fail to meet the RFP requirements?
>
> A. Yes.

Hearing Transcript (Tr.) at 167, 384-85.

The SSA also testified:

> Q. Can you think of an example of something they [Metro] could have done which would have continued to have them propose to do the production work in Norfolk and would have made their proposal acceptable?
>
> A. No. The answer is no to that . . . .

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[7]As discussed below, in arguing that the protest should be denied for lack of prejudice, the agency maintains that each of the factors on which the agency relied in finding Metro's proposal unacceptable constituted an independent basis for rejecting Metro's proposal.

Q. No. In other words, it was the Navy's view that proposing to do the production work in Norfolk made the proposal unacceptable?

A. Yes.

Tr. at 168-69.

Notwithstanding the SSA's testimony, the TPET chair--who was responsible for preparing the technical discussion questions--testified as follows:

Q. Did you view [Metro's] proposal of a production shop in Norfolk as failing to meet the RFP criteria? Or failing to meet the RFP requirements, I'm sorry.

A. I'll have to say no.

Tr. at 253.

ADD's final evaluated price was $238,494,739--[deleted] Metro's evaluated price of [deleted]. Nonetheless, the agency selected ADD's proposal for award, noting, as discussed above, that Metro's proposal was unacceptable. Apparently because of the agency's determination that Metro's proposal was unacceptable, there was no trade-off between the relative technical merits of ADD's and Metro's proposals and the costs to the government.

The contract was awarded to ADD on December 29. This protest followed.

DISCUSSION

Metro contends that the agency conducted materially misleading discussions regarding Metro's proposal to perform production shop work in Norfolk. We agree.

It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. SRS Techs., B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 at 6; Ranor, Inc., B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258 at 4. Specifically, an agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns; misinform the offeror concerning a problem with its proposal; or misinform the offeror about the government's requirements. Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168 at 9-11; DTH Management Group, B-252879.2, B-252879.3, Oct. 15, 1993, 93-2 CPD ¶ 227 at 4. More specifically, when an agency asks a general question indicating concern regarding a perceived weakness in an offeror's proposal, then subsequently rejects the proposal as technically unacceptable on the basis of this concern, a question which could not reasonably be

construed as putting the offeror on notice of the agency's actual concern regarding the acceptability of its proposal does not constitute adequate discussions. Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD 300 at 5-6.

Here, as noted above, it was the SSA's perception that Metro's proposal to perform production shop work in Norfolk was inconsistent with a material solicitation requirement, thereby rendering the proposal unacceptable.[8] In explaining the basis for her conclusion regarding the solicitation requirements, the SSA referred to the provisions under CLIN 0001 in RFP § C, which state:

> The contractor will prepare and provide an operating basin and mooring site acceptable to the Government and will provide necessary supporting facilities to accommodate the AFDM-7 or a contractor-furnished dry dock. The proposed mooring location for the dry dock must be within a 75-mile radius and a 90-minute commute of the Mayport Naval Station.
>
> . . . . .
>
> The proposed facility will have pier facilities, utilities, production facilities, and support facilities to accommodate the dry dock and the ships to be docked as required to accomplish the repairs to be furnished under the contract.

RFP § C, at 144, 146; Tr. at 162-64.

In fact, there is nothing in the above RFP provisions that necessarily precludes an offeror's use of a Norfolk production shop. Clearly, the 75-mile radius and 90-minute commute requirements apply to the "mooring location for the dry dock." The subsequent requirements for "pier facilities, utilities, production facilities, and support facilities" are not limited by geographic location, but rather may reasonably be interpreted as imposing limitations on location only to the extent that such facilities must be provided, "as required to accomplish the repairs."

The agency's assertion that the RFP provisions "clearly" required that production facilities, as well as pier facilities, support facilities, and utilities, were to be located at or relatively near the proposed site," see Agency Post Hearing Brief at 47, is

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[8]The agency categorically states: "[t]he Navy's requirement for on-site production facilities was a material requirement." Agency Post Hearing Brief at 51. Accordingly, if the agency properly believed that Metro's proposal failed to comply with a material solicitation requirement, the proposal should have been considered technically unacceptable. International Sales Ltd., B-253646, Sept. 7, 1993, 93-2 CPD ¶ 146 at 2.

inconsistent with the TPET Chair's own testimony that he did not view the RFP requirements as precluding Metro's proposed use of its Norfolk production shop. Tr. at 253. In addition, the agency's assertion that the 75-mile radius and 90-minute commute requirements apply to all support facilities appears inconsistent with the provisions of RFP § L.2-7 which states:

> If the company has offices or plants in other areas outside the geographical cognizance of SupShip Jacksonville, the organizational chart must clearly show those involved in this effort.

RFP § L.2-7, at 206.

In any event, even if the agency had reasonably viewed the RFP as mandating the provision of production facilities within the geographic limitation applicable to the mooring location, it would have been misleading for the agency to suggest during discussions that Metro could propose actions to "mitigate the problems associated with the physical distance between Jacksonville and Norfolk." Rather, if the SSA's stated views regarding the RFP requirement for production facilities to be located near Jacksonville were correct, that fact should have been communicated to Metro.[9]

Although the SSA testified that it was her belief, at the time the discussion questions were sent to Metro, that Metro's proposal failed to comply with the solicitation requirements, see Tr. at 167, this issue was apparently never discussed with the TPET chair, who was responsible for preparing the technical discussion questions.[10] The SSA also acknowledged that, during subsequent face-to-face discussions with Metro, the agency did not indicate that Metro's proposed use of its Norfolk production shop facilities rendered its proposal unacceptable. Tr. at 160-66. Nonetheless, as noted above, the SSA did not believe there was any acceptable response that Metro could have provided other than to propose to perform the production shop work in the Jacksonville area. Tr. at 168-169. In short, the agency's discussions effectively communicated to Metro that its proposal to perform production shop work in Norfolk was acceptable, though in need of enhancements

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[9][deleted].

[10]The TPET chair testified:

> Q. Did you ever discuss this issue in terms of the RFP requirements in the context of Metro's proposal of the production shop facility in Norfolk with [the SSA]?
>
> A. I can't remember. I don't think so.

Tr. at 253.

or modifications to mitigate problems associated with distance, when, in fact, only a proposal to perform the production shop work in the Jacksonville area would have been considered acceptable.

Under these circumstances, in order for the discussions to be meaningful, the agency was required to convey to Metro that its proposed approach to performing production shop work would have to be fundamentally altered--not merely explained or enhanced. Accordingly, on the record here, the agency failed to conduct meaningful discussions with Metro.

The agency argues that, even if its discussions with Metro were inadequate, the protest should be denied for lack of prejudice because there were other factors affecting the agency's determination. The agency contends that any defect in its discussions could not have prejudiced Metro because Metro's proposal would not have been selected in any event.

Competitive prejudice is an essential element of a viable protest; GAO will not sustain a protest where no prejudice is evident. Microeconomic Applications, Inc., B-258633.2, Feb. 14, 1995, 95-1 CPD ¶ 82 at 10. Nonetheless, to establish prejudice, a protester is not required to show that, but for the alleged error, the protester would have been awarded the contract. Management HealthCare Prods. & Servs., B-251503.2, Dec. 15, 1993, 93-2 CPD ¶ 320 at 4; Manekin Corp., B-249040, Oct. 19, 1992, 92-2 CPD ¶ 250 at 5. Rather, it is enough that the record contain evidence reflecting a reasonable possibility that, but for the agency's actions, the protester would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

Here, we find that, but for the agency's failure to conduct meaningful discussions, there was a substantial chance that Metro would have been selected for award. Our conclusion in this regard is significantly affected by the [deleted] difference in the evaluated prices of the two proposals. As noted above, applying the price evaluation methodology which the agency established in the solicitation, ADD's price of $238,494,739 was [deleted] more than Metro's price of [deleted].[11]

[11]The agency suggests that the difference in evaluated prices is not a valid measurement of the actual costs of contract performance, noting that the prices reflect a summation of all possible tasks that could be performed on each of the four classes of ships to be serviced. While it is true that not all tasks priced and evaluated will be ordered for any given availability, it is also true that each CLIN reflects the pricing for only a single ship, while the agency asserts that as many as eight ships may be drydocked and serviced in any given year.

The agency first argues that, although Metro's proposed prices for the actual ship repair work (CLINs 0004 through 0007) were considerably lower than ADD's corresponding prices, Metro's proposal would not have been selected for award in any event because Metro's price proposal was unbalanced. The agency's assertions regarding unbalancing are based on the fact that Metro's prices for CLINs 0001 and 0002 were considerably higher than ADD's CLIN 0001 and 0002 prices.[12] The agency asserts that there was some risk that ship repair work under CLINs 0004 through 0007 would not "materialize," Agency Report at 26, and expresses concern about paying Metro's higher CLIN 0001 and CLIN 0002 prices "regardless of whether any ship repair work was ordered under the [CLINs 0004 through 0007] IDIQ line items." Agency Post Hearing Brief at 84.

A critical element to determining whether unbalancing exists between line items is the accuracy of the government projections regarding the quantities of work to be obtained under each line item.[13] Sanford Cooling, B-242423, Apr. 15, 1991, 91-1 CPD ¶ 376 at 4. Estimates must be based on the most current information available and be reasonably accurate representations of the government's anticipated actual needs. Duramed Homecare, B-245766, Jan. 30, 1992, 92-1 CPD ¶ 126 at 6. Where the agency concludes that the estimates in the solicitation do not have a reasonable probability of being accurate, the solicitation should be cancelled. Food Servs., Inc., B-243173, B-243173.2, July 10, 1991, 91-2 CPD ¶ 39 at 5.[14] If the solicitation estimates are accurate, there can be no material unbalancing. Landscape Builders Contractors, B-225808.3, May, 21, 1987, 87-1 CPD ¶ 533 at 2.

As noted above, RFP attachment J-5 listed twenty-two ships that, at the time the solicitation was issued, the agency intended to drydock and service under this procurement. In asserting that it was concerned that the originally projected drydock and repair work might not "materialize," the agency has not suggested that it plans to drydock and repair any of the twenty-two vessels elsewhere,[15] nor has it

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[12]The agency acknowledges that it did not develop a government cost estimate for CLINs 0001 and 0002 (and corresponding option year CLINs) "[b]ecause the scope of work for CLINs 0001 and 0002 could vary among offerors." Agency Report at 24.

[13]Although unbalancing in connection with quantity estimates usually arises in the context of requirements contracts, we believe that it could arise in the context of a single-award, task-order contract such as this one.

[14]Our Office has previously cautioned the Navy that, in issuing solicitations, the agency has an affirmative duty to use the best quantity estimates available. Sanford Cooling, B-242423, Apr. 15, 1991, 91-1 CPD ¶ 376 at 8.

[15]In responding to Metro's protest, the agency explained the rationale underlying
(continued...)

identified any other specific factor which suggests that its initial projections were inaccurate.[16] Because of the lack of any reasoned analysis which raises a serious question whether the number of ships estimated at the time the solicitation was issued will be substantially diminished, there is no reasonable basis for the agency's concern that Metro's proposal is materially unbalanced.

Finally, the agency argues that, notwithstanding the inadequate discussions, Metro's protest should be denied for lack of prejudice on the basis that Metro's site lease with JPA does not comply with the solicitation requirements. In this regard, the agency relies on RFP section H-9 which provides: "The contract maximum amount shall be defined as 200% of the total amount of CLINs 0003 through 0007 for the base year." Because each of the four ship repair CLINs contain requirements for a single ship, the agency concluded that offerors must be able to drydock a maximum of eight ships per year.

In its initial proposal, Metro provided a copy of its lease with JPA, which the Navy viewed as limiting Metro to five ship dockings per year. During discussions the agency advised Metro of its concern. In response, Metro provided the agency with a letter from JPA stating: "Use of the layberth for dockings in excess of 5 drydockings per year allowed as part of the lease agreement is available to Metro." Letter from JPA to the President, Metro Machine Corp. (July 22, 1998). Metro's final revised proposal further explained that it was not limited to five dockings per year, but that, "[f]or emergency drydockings and whenever the number of scheduled

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[15](...continued)
this procurement, as follows:

> The establishment of a dry dock capability in the Jacksonville homeport area has been a matter of deep importance to the Navy. Presently, Navy vessels homeported in the Jacksonville area must be sent outside the homeport for dry dock-related repair work. Requiring the dry dockings to take place outside of the Jacksonville area adversely impacts the quality of life for the ships' crews and their families. There is significant concern within the Navy that the reduced quality of life produced by extended maintenance periods out of the homeport area will adversely affect crew morale, retention, and readiness.

Agency Report at 7-8.

[16]Rather, the Navy asserts, generally, that its "uncertainty" regarding the amount of ship repair work that will actually be required under this contract is based on "downsizing within the DoD and the Navy, ships being decommissioned, or dry dock maintenance cycles being lengthened." Agency Report at 26.

drydockings exceeds five, Metro will be required to pay to JPA its published tariff . . . . The Navy will see no additional charges for any such eventualities covered by this contract." Metro Final Revised Proposal, Responses to Q&A, at 17-18.

Following submission of Metro's final revised proposal, the agency's best value advisory committee (BVAC) acknowledged that the lease did not limit Metro to five drydockings per year, stating: "As a result of discussions, [JPA] issued a letter allowing Metro, as well as others, use of the layberth area in excess of five drydockings per year." Memorandum from the BVAC to the Contracting Officer at 5 (Dec. 14, 1998). Similarly, at the hearing, both the SSA and TPET Chair acknowledged that Metro's proposal was not limited to 5 drydockings per year. Tr. at 100-101; 258.

Based on this record, it is clear that Metro's proposal does not take any exception to the solicitation requirement establishing the maximum quantity of eight ships that may be required to be drydocked in a given year.[17]

The protest is sustained.

RECOMMENDATION

We recommend that the agency reopen negotiations, conduct meaningful discussions with both offerors, request best and final offers, and evaluate those proposals consistent with the solicitation's stated requirements. In the event that the RFP does not reflect the agency's actual requirements, the solicitation should be modified.[18] If, as a result of this reevaluation, Metro's proposal is selected for

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[17]To the extent the agency was concerned that, in performing the contract, Metro [deleted], such concern does not constitute a failure to comply with the solicitation requirements.

[18]Metro also protests that the agency failed to properly assess the relative risks associated with ADD's proposed use of the *Sustain*, as required by RFP § M.2.3, which, as noted above, advised offerors that proposals "will be evaluated to determine the offeror's overall risk in being able to perform the requirements of this contract relative to operating and maintaining the dry dock and performing the required dry dock repairs to applicable ships." The agency acknowledges that it "did not qualitatively assess [ADD's] proposed use of *Sustain*," arguing that, despite the express language of RFP § M.2.3, "It would be patently unfair . . . to . . . subject the offerors proposing to use *Sustain* to a comparative assessment against any privately owned dry dock that might be offered." Agency Post Hearing Brief at 34, 37. In light of our decision regarding the agency's inadequate discussions, we do not reach the merits of Metro's protest regarding the agency's evaluation of

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
May 6, 1999
Decided June 25, 1999
No. 98-5251
McDonnell Douglas Corporation, Appellant v. National Aeronautics and Space Administration

McDonnell Douglas Corporation appealed the district court's grant of summary judgment in favor of the National Aeronautics and Space Administration's (NASA) decision to release certain contract line item prices under the Freedom of Information Act.

Decision Reversed.

I. In this reverse FOIA action, McDonnell Douglas sought to prevent NASA from releasing satellite launch pricing information contained in a contract between the two, under which the company had agreed to provide medium-light expendable launch vehicle services. In NASA's solicitation of bids for the contract, the agency requested the submission of proposed prices for certain contract line items, including prices for several launch missions and various other launch-related services. McDonnell Douglas responded with a bid based on its Delta launch vehicle. No other contractors submitted proposals for the contract, and after further negotiations on prices and terms including an agreement to eliminate a clause stating that pricing information in the contract was considered to be in the public domain, NASA awarded the contract to McDonnell Douglas.

Several months later, FOIA Group, Inc., submitted a FOIA request to NASA, seeking a copy of the contract. NASA notified McDonnell Douglas of the request, and of the company's opportunity to file objections within five days, pursuant to its regulations. The company objected to the release of certain information in the contract including launch service prices, cost figures for specific launch service components and overhead, labor rates, and profit figures and percentages on the basis that it was protected under FOIA Exemption 4 as confidential commercial or financial information.

Exemption 4 provides that an agency is not obliged to disclose information consisting of trade secrets and commercial or financial information obtained from a person and privileged or confidential (5 U.S.C. 552(b)(4) (1994)) Whether such information is protected turns in part on whether it was provided to the government voluntarily or under compulsion: if

the financial or commercial information was disclosed to the government voluntarily, it will be considered confidential for purposes of Exemption 4 if it is the kind of information that would customarily not be released to the public by the person from whom it was obtained. Critical Mass Energy Project v. Nuclear Regulatory Comm, 975 F.2d 871, 879 (D.C. Cir. 1992). If the information was required; however, it will be considered confidential only if disclosure would be likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See id. 878-80 (reaffirming test of National Parks & Conservation Assn v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), but confining it to cases of compelled disclosure). Although if the information falls within Exemption 4, the agency is not precluded from disclosing it under FOIA (an exemption simply means that the government is not compelled to disclose it), see Chrysler Corp., v. Brown, 441 U.S. 281, 290-95 (1979); CNA Fin. Corp. vs. Donovan, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987), the courts have held that the Trade Secrets Act, 18 U.S.C. 1905 (1994), is at least coextensive with that of Exemption 4 of FOIA, id. at 1151. Therefore, when a person can show that information falls within Exemption 4, then the government is precluded from releasing it under the Trade Secrets Act. See McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1164 (D.C. Cir. 1995).

McDonnell Douglas claimed that since its decision to enter into the contract was voluntary, providing bid information as part of that contract was also voluntary. Therefore, Critical Mass governs, and Exemption 4 applies because bid information is not the kind of information that it would customarily release to the public. Alternatively, the company argued that, even if it were obliged to provide the information to NASA, the information fell within Exemption 4 under National Parks because disclosure would likely impair the government's ability to obtain such information in the future and would likely cause substantial harm to McDonnell Douglas' competitive position. Since the information falls under Exemption 4 either under Critical Mass or National Parks the company asserted that the Trade Secrets Act precludes the agency from releasing it. NASA rejected these arguments and issued a Notice of Intent to release the contract's line item pricing information. NASA determined that the company was obliged to provide the information in the contract; therefore, National Parks and not Critical Mass was the controlling standard. Although NASA determined that the

disclosure of certain information -- labor rates, overhead factors, profit information, and launch service cost figures were likely to cause substantial competitive harm to McDonnell Douglas and would not be released, NASA regarded the line item pricing information differently. NASA rejected the contention that competitive harm was likely, reasoning that release of pricing information would not allow competitors to underbid McDonnell Douglas, nor would it allow the company's commercial customers to negotiate more effectively and thereby ratchet down McDonnell Douglas' prices. The company filed this reverse FOIA suit, alleging that NASA's decision to release the line item pricing information was unlawful under the APA. On cross motions for summary judgment, the district court granted summary judgment for the agency. See McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12, 13 (D.D.C. 1997).

II. The company not only argued that Critical Mass applied that its submission of bidding information was part and parcel of the voluntary act of submitting a bid but it claimed that the administration, through the Justice Department, is unlawfully seeking to nullify the recent Critical Mass decision by taking an unduly restrictive interpretation of voluntary submissions, and by instructing agencies to operate as if Critical Mass had never been decided and only National Parks governed Exemption 4 cases. If the government will not make a good faith effort to distinguish the submission of Exemption 4-type information that is voluntary from that which is required, it is argued the courts should use the Critical Mass test alone to determine whether information is confidential under Exemption 4 and the Trade Secrets Act. Accordingly, appellant went so far as to ask us to flatly overrule National Parks.

Although it seems somewhat troubling that Justice, in 1993, instructed the agencies that they should treat most information given to the government as required, without any serious effort analytically to distinguish voluntarily supplied information from that which is required within the meaning of Critical Mass, the court did not think it was even necessary in this case to decide whether appellant's bidding information was voluntarily submitted still less whether the court should, as a full court, reconsider overruling National Parks. That is because assuming that National Parks applies that the bidding information was not voluntarily submitted the court believed the disputed line item price information was confidential commercial or financial information under the National Parks test.

It was undisputed that the total price of the contract may be made public. The government did not claim that it or NASA had any independent legal authority to release line item pricing information. It did point out that NASA has a long and consistent practice of doing so. The court stated that is of no consequence. If commercial or financial information were likely to cause substantial competitive harm to the person who supplied it, that is the end of the matter, for the disclosure would violate the Trade Secrets Act. The court noted in a previous case that it appeared passing strange that the prices charged to the government for specific goods could be confidential, McDonnell Douglas v. Widnall, 57 F.3d at 1167, but the court did not address the competitive harm issue in that case.

Appellant claimed the release of line item pricing information would cause it competitive harm for two reasons: it would permit its commercial customers to bargain down (ratchet down) its prices more effectively, and it would help its domestic and international competitors to underbid it (the company claimed that disclosure of the line item pricing data would allow competitors to calculate its actual costs with a high degree of precision).

NASA's response to appellant's concern that its customers' bargaining leverage will be enhanced is rather mystifying. The agency said that publication of line item prices is the price of doing business with the government, which either assumes the conclusion, or else assumes a legal duty or authority on the government to publicize these prices, which, as the court noted, the government does not assert. NASA did recognize that if disclosure enabled competitors to underbid McDonnell Douglas that would constitute competitive harm. See Gulf & Western Indus., Inc., v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979). The agency reasoned that underbidding due to the disclosure would not occur because price is only one of the many factors used by the government in awarding contracts. That response seems too silly to do other than to state it, and pass on.

Perhaps the most convoluted even astonishing reason given by NASA for claiming appellant would not be likely to suffer competitive harm is that it is [McDonnell Douglas'] competitors who have suffered competitive harm in failing to learn the prices for [McDonnell Douglas'] domestic launch vehicles since their line item prices have become public. As should be obvious, by so stating, NASA implicitly recognized that it would

be to the competitor's advantage to receive McDonnell Douglas' line item price information. It follows that the appellant will be competitively harmed by that disclosure. That the appellant's competitors have not attempted to stop the disclosure of their line item prices is of no significance in determining the issue before the court.

NASA's decision could either be seen as not in accordance with law because releasing the information would be contrary to the Trade Secrets Act, or as arbitrary and capricious for its illogical application of the competitive harm test. Under either rubric, the decision must be set aside. Both of the reasons McDonnell Douglas advanced for claiming its line item prices were confidential commercial or financial information are indisputable. McDonnell Douglas had shown as much as anyone can show before the event that it is likely to suffer substantial competitive harm. Under present law, whatever may be the desirable policy course, appellant has every right to insist that its line item prices be withheld as confidential.

1. NASA also argued, inconsistently, that disclosure would not be harmful to the company's competitive position because competitors can underbid McDonnell Douglas now with information already available.

2. The court determined that it need not address McDonnell Douglas' alternative argument that disclosure of its pricing information would also satisfy the impairment prong of National Parks. Though the court did note that one circuit court held that a submitter cannot even raise the government's interests on behalf of the agency in a reverse FOIA case. See Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988).